

32ND MEETING
OF THE
MARYLAND HEALTH CARE COMMISSION

Thursday, March 21, 2002
Minutes

Chairman Wilson called the meeting to order at 1:00 p.m.

Commissioners present: Alcoreza, Beasley, Chase, Crofoot, Etheredge, Jensen, Malouf, Picciotto, Row, and Zanger

ITEM 1.

Approval of Minutes

Vice Chairman George Malouf made a motion to approve the Minutes of the February meeting of the Commission, which was seconded by Commissioner Ernest B. Crofoot, and unanimously approved.

ITEM 2.

Update on Commission Activities

- Data Systems and Analysis
- Health Resources
- Performance and Benefits

Ben Steffen, Deputy Director of Data Systems and Analysis, referred the Commissioners to the written *Update of Activities*. Additionally, Mr. Steffen announced that the *Practitioner Utilization: Trends Within Privately Insured Patients, 1999-2000* report would be available on the Commission's website at: <http://www.mhcc.state.md.us/database/exputil2001/PracRept032102.pdf>. Printed versions of the report would be available on or about April 1st.

Pamela Barclay, Deputy Director of Health Resources, referred the Commissioners to the Health Resources section of the *Update of Activities*.

Barbara McLean, Executive Director, reported on behalf of Enrique Martinez-Vidal, Deputy Director of Performance and Benefits. Ms. McLean said that Mr. Martinez-Vidal was not able to attend the Commission meeting because he was in Annapolis providing testimony on behalf of the Commission. For further information on the activities of the Performance and Benefits division, Ms. McLean referred the Commissioners to the written *Update*.

Chairman Wilson announced that the Commission is strictly adhering to public comment deadlines. If comments are not received at the offices of the Commission by the due date, then they will be returned to the sender. Copies of the *Update of Activities* were available on the documents table and on the Commission's website at: <http://www.mhcc.state.md.us/mhccinfo/cmsnmtgs/updates/0302.pdf>.

ITEM 3.

FINAL ACTION: COMAR 10.24.08 — State Health Plan for Facilities and Services: Long Term Care Services

Chairman Wilson said that the Commission had four sets of regulations to consider for final action.

Linda Cole, Chief of Long Term Care Services, reported on the Commission's procedures and timeline related to the promulgation of the regulation. The formal public comment period ended on February 21, 2002. The Commission received one set of public comments. A summary and staff analysis of those comments was provided to the Commissioners. After careful review and analysis of the public comments, staff recommended that the Commission adopt the proposed regulation as final without changes. Commissioner Crofoot made a motion to approve the regulation, which was seconded by Vice Chairman Malouf, and unanimously approved.

ACTION: COMAR 10.24.08 — State Health Plan for Facilities and Services: Long Term Care Services is hereby approved as Permanent Regulation.

ITEM 4.

FINAL ACTION: COMAR 10.24.12 — State Health Plan for Facilities and Services: Acute Inpatient Hospital Obstetrics Services

Patricia Cameron, Chief of Acute and Ambulatory Care Services, reported on the Commission's procedures and the timeline related to the promulgation of the regulation. A public hearing was held on February 21, 2002. The formal public comment period ended on February 25, 2002. A summary of the comments presented at the February public hearing (which was convened by Commissioner Evelyn Beasley) and the additional written comments received was provided to the Commissioners. After careful review and analysis of the public comments, staff recommended that the Commission adopt the proposed regulation as final without changes. Ms. Cameron further explained the methodology with regard to the need analysis in response to a question from Commissioner John A. Picciotto. Commissioner Constance Row reiterated her previously expressed concerns regarding changing the methodology, requested that staff further study and evaluate the methodology within two years, and then made a motion to approve the regulation, which was seconded by Commissioner Walter E. Chase, Sr., and unanimously approved.

ACTION: COMAR 10.24.12 — State Health Plan for Facilities and Services: Acute Inpatient Hospital Obstetrics Services is hereby approved as Permanent Regulation.

ITEM 5.

FINAL ACTION: COMAR 10.24.15 — State Health Plan for Facilities and Services: Organ Transplant Services

Bridget Glazebrook, Health Policy Analyst, summarized the Commission's procedures and timeline related to the promulgation of the regulation. The formal public comment period ended on February 25, 2002. The Commission received one set of public comments on the proposed regulation. A summary of the comments and the staff analysis was provided to the Commissioners. After careful review and analysis, staff recommended that the Commission adopt the proposed regulation as final with one non-substantive change to COMAR 10.24.15.04(C)(3)(f) to clarify the period of time necessary to achieve FACT accreditation.

Commissioner Row made a motion to approve the regulation, which was seconded by Vice Chairman Malouf, and unanimously approved.

ACTION: COMAR 10.24.15 — State Health Plan for Facilities and Services: Organ Transplant Services is hereby approved as Permanent Regulation.

ITEM 6.

FINAL ACTION: COMAR 10.25.07 — Electronic Health Network Certification

David Sharp, Chief, EDI Programs and Payer Information Systems, reported on the Commission's procedures and timeline related to the promulgation of the regulation. The Commission received no public comment. Commissioner Picciotto made a motion to approve the regulation, which was seconded by Commissioner Lenys Alcoreza, and unanimously approved.

ACTION: COMAR 10. 25.07 — Electronic Health Network Certification is hereby approved as Permanent Regulation.

ITEM 7.

ACTION ITEM: EMERGENCY CERTIFICATE OF NEED — CONFIRMATION

Devereux Chesapeake Treatment Network-Temporary Relocation of 24 Children's Residential Treatment Center Beds to Washington Waldorf School in Rockville, Md.

Chairman Wilson asked Joel Tornari, Assistant Attorney General (AAG), to explain the circumstances requiring this action. Mr. Tornari said that Devereux Chesapeake Treatment Network applied for an Emergency Certificate of Need (CON) for the temporary relocation of 24 children's residential treatment center patients from a facility in the District of Columbia (due to lead abatement procedures) to a facility in Rockville. Ms. McLean approved the CON in February. The Executive Director's action required confirmation by the Commission. Chairman Wilson verified that the emergency CON would be effective for 165 days. Commissioner Evelyn Beasley made a motion to confirm the Emergency Certificate of Need, which was seconded by Commissioner Crofoot and unanimously approved.

ACTION: EMERGENCY CERTIFICATE OF NEED — Confirmation of Executive Director's Decision to Grant Emergency CON to Devereux Chesapeake Treatment Network for the Temporary Relocation of 24 Children's Residential Treatment Center Beds to the Washington Waldorf School in Rockville, Montgomery County, Maryland is hereby approved.

ITEM 8.

ACTION ITEM: Certificate of Need (CON) REVIEWER'S RECOMMENDED DECISION/EXCEPTIONS HEARING Harbour Inn Convalescent Center-Abandonment of Comprehensive Care Facility Beds

Chairman Wilson announced that Agenda Items 8 and 9 would be exceptions hearings regarding recommended decisions authored by Commissioners'. He thanked Commissioners Row and Jensen for their time in consideration of these matters. Chairman Wilson said that Item 8 would be an Exceptions Hearing in Consideration of a Motion for Reconsideration of a staff determination that 225 beds previously authorized at Harbour Inn Convalescent Center in Baltimore, Maryland were abandoned. Commissioner Row reviewed

the determination of the Commission staff and issued a Proposed Decision. Commissioner Row's Decision affirmed the staff determination that Harbour Inn was not entitled to temporarily delicense the beds. Harbour Inn filed Exceptions to that Proposed Decision. The Commission heard oral argument on the Exceptions.

Exceptions Hearing

Henry Schwartz, counsel for Harbour Inn, argued that Commissioner Row's finding, that Harbour Inn's request had been untimely, placed the facility in a "Catch-22" situation wherein the temporary delicensure was based not upon a proposal made by the facility, but instead upon factors imposed upon the facility that were beyond its control, i.e., the loss of Medicare/Medicaid certification. Mr. Schwartz further argued that any precedent set by the decision in the Harbour Inn case would apply equally in other analogous cases, with bad results. The Commission would not wish to automatically consider beds as "abandoned" in all circumstances that could not have been anticipated with certainty when a nursing facility moved out its residents. The advance notice requirements of COMAR 10.24.01.03(C) as they relate to the Commission's ability to approve "temporary delicensure" of nursing facility beds should be limited to those situations, as described in the proposed State Health Plan, that are "voluntary," and should not be applied to situations where residents are removed from a facility under circumstances beyond the control of the facility.

Suellen Wideman, AAG, and counsel to the Commission's staff, argued that exceptions to a proposed decision are based upon sound policy and practical implications. The Commission promulgated the regulations in 2000 and provided written notice to all facilities of the promulgation at that time. In November of 2000, the Maryland Office of Health Care Quality (OHCQ) provided notice to Harbour Inn of its licensure problem. The facility lost its Medicare and Medicaid certification on June 11, 2001. Harbour Inn made no request to temporarily delicense the beds at that time. Harbour Inn's request to temporarily delicense the beds was not made until August 8, 2001, which was nearly two months after losing Medicare and Medicaid Certification. Mr. Schwartz argued in rebuttal that Ms. Wideman's argument did not detract from his own argument on behalf of Harbour Inn.

Commissioner Row said that when Harbour Inn made its request for the temporary delicensure, there were no licensed or operating beds for which it could seek a temporary status. A closed facility, without patients or residents, is not an operating or licensed facility in a position to seek permission to delicense beds under COMAR 10.24.01.03C(1)(a). The administrative record reflects that as of January 2001, Harbour Inn knew that it was at significant risk of losing its federal certification. While strong financial and health care quality pressures faced Harbour Inn at the time, no emergency precluded Harbour Inn from addressing future possible disposition of the beds. Since the request was not made until the facility closed, and was thus untimely, the Commission need not address the factors set forth at COMAR 10.24.01.03C(1)(b)-(d) which would be examined during consideration of a timely request. Commissioner Row added that regulations do not specifically address every possible factual situation. Her proposed decision was based upon findings that the facility did not operate in compliance with the regulations; that it did not take appropriate action; it did not file appeal of the decertification; and that the licensure problems and loss of Medicare and Medicaid certification were preventable. Commissioner Row recommended that the Commission approve her Recommended Decision that the staff decision to delicense the beds was appropriate.

Following discussion, Commissioner Crofoot made a motion to accept the Reviewer's Recommended Decision, which was seconded by Commissioner Chase. Commissioner Lynn Etheredge recommended that a facility should automatically lose its CON due to loss of Medicare and Medicaid certification. Commissioner Marc E. Zanger asked if the proposed Commission action would result in the loss of the facility's CON. Ms. Wideman replied that the facility would lose its CON and further advised the Commissioners that there is no need in Baltimore City for additional beds at this time. Chairman Wilson called for a vote and the motion to accept the Reviewer's Decision was unanimously approved.

ACTION: The Certificate of Need (CON) REVIEWER'S RECOMMENDED DECISION, Harbour Inn Convalescent Center-Abandonment of Comprehensive Care Facility Beds is hereby APPROVED.

ITEM 9.

ACTION ITEM: Certificate of Need (CON) REVIEWER'S RECOMMENDED DECISION/EXCEPTIONS HEARING, Manor Care-Catonsville, Docket Number 01-03-2087

Chairman Wilson said that the next item on the agenda would be an Exceptions Hearing in the matter of Manor Care Health Services, Inc. – Catonsville. Manor Care applied to the Commission for a Certificate of Need to construct a new 110-bed nursing facility in the southwestern part of Baltimore County to be known as Manor Care-Catonsville. Commissioner Allan Jensen served as the Reviewer in this matter. Henry E. Schwartz filed Exceptions to the Reviewer's Recommended Decision on behalf of Genesis Health Ventures, a nursing home provider that operates several facilities in the area, which was an Interested Party in this review.

Exceptions Hearing

Henry Schwartz argued that Genesis Health Ventures (Genesis) took Exception to the following findings/conclusions of the Reviewer: (1) Review Criterion .08G(3)(d). Viability of the Proposal. Inadequate consideration was given to health facility staffing shortages with reference to availability of staff to meet the projected need for resident care. He also questioned that the proposed facility would be able to meet its objectives regarding patient census. (2) Review Criterion .08G(3)(f). Impact on Existing Providers. No consideration had been given, either by the Applicant or by the Reviewer, to the impact on existing facilities of the drain of residents and staff that would be occasioned by the Applicant's success in these areas.

Jack Tranter, counsel for Manor Care (the Applicant), argued that the Reviewer properly determined that Manor Care's proposed project is viable, as required by Review Criterion .08G(3)(D) in that the Reviewer's Proposed Decision properly determined that Manor Care's occupancy projections are reasonable and achievable, and that the Reviewer properly determined that Manor Care will be able to obtain nursing staff for the proposed facility. He further argued that the Reviewer's determination that the proposed project would not have a material untoward impact on existing providers and that the proposed project offers benefits to the health system as a whole should be upheld. Mr. Schwarz reiterated in rebuttal that project viability and impact on existing providers were not considered.

Commissioner Jensen said that following careful review and analysis of the application, he determined that the capital project proposed by Manor Care and the reimplementation at a new facility of 110 comprehensive care facility beds to be relocated from its four existing Baltimore County nursing facilities met all applicable State Health Plan standards and complied with the Commission's general CON review criteria. He recommended that the Commission approve the application of Manor Care for CON to undertake the capital expenditure of \$10,082,727, subject to the conditions set forth in the Recommended Decision. Vice Chairman Malouf made a motion to accept the Reviewer's Recommendation, which was seconded by Commissioner Beasley, and unanimously approved.

ACTION: The Certificate of Need (CON) REVIEWER'S RECOMMENDED DECISION, Manor Care-Catonsville, Docket Number 01-03-2087, is hereby APPROVED.

ITEM 10.

PRESENTATION: *Practitioner Utilization: Trends Within Privately Insured Patients, 1999-2000*

Chairman Wilson said that the Commission is required by Maryland law to annually report on the use of practitioner services by residents and the associated payments by insurance companies and recipients for those services. To provide the Commission with data on fees and utilization patterns, insurance companies and health maintenance organizations (HMOs) submit information to the Commission under state regulations. The data from these submissions constitute the Medical Care Data Base. This year, the Commission contracted with Dr. Christopher Hogan to assist in the development of a report that examined payment changes in 1999 and 2000. Dr. Hogan is a former principal policy analyst with the Medicare Payment Advisory Commission and the Physician Payment Review Commission. Dr. Hogan is currently president of Direct Research, a Fairfax, Virginia health policy consulting firm, where he advises provider groups and payer organizations on reimbursement issues. Dr. Hogan presented a summary of the goals of the analysis, data and methods, trends in spending and volume of care, private and Medicare payment rates, and some of the major findings from the report regarding spending growth, such as privately insured spending for practitioner care rose about 10% and was entirely due to increased volume, not increased fees (payment per RVU). HMO and non-HMO spending showed similar patterns, suggesting that drivers of cost growth are common to all plans (e.g., technology, practice pattern changes). Findings regarding payment levels included: HMOs and non-HMOs had similar average rates that were slightly above Medicare's. Rates vary by type of service. Private payments were below the Medicare fee schedule for office visits and above the Medicare fee schedule for most other services. Rates also vary by geography based upon the site of the service rendered. Chairman Wilson thanked Dr. Hogan for his presentation.

ITEM 11.

LEGISLATIVE REPORT

Ms. McLean reviewed legislative action in the Maryland General Assembly over the past month. As of mid-March, the Commission took no position on 65 of the 94 bills reviewed by the staff. Ms. McLean said that the Commission's budget for next year had not been cut though two vacant full time staff positions were eliminated. Two contractual positions for staffing cardiac and HIPAA projects, however, were approved. The Commissioners and staff discussed the Commission's position on recently filed new legislation. The consensus was to support with amendment a bill that would require the Commission to study reimbursement of health care providers and to support with amendment a bill that would establish a task force to study expansion of the all-payor system. The Commissioners and staff also generally discussed reported findings of the most recent Institute of Medicine report. Chairman Wilson requested that staff read and analyze the findings of the report and bring recommendations to the Commission regarding access issues.

ITEM 12.

Hearing and Meeting Schedule

Chairman Wilson announced that the Commission Hearing and Meeting Schedule was available at the documents table, as well as on the Commission's website. The next scheduled meeting of the Maryland Health Care Commission will be at 1:00 p.m. on Thursday, April 18, 2002 at 4201 Patterson Avenue, Rooms 108-109, in Baltimore, Maryland.

ITEM 13.

Adjournment

There being no further business, the meeting was adjourned at 2:42 p.m. upon motion of Vice Chairman Malouf, which was seconded by Commissioner Zanger, and unanimously approved by the Commissioners.